



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 27, 2010

Ms. Neera Chatterjee
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2010-14634

Dear Ms. Chatterjee:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 395263 (OGC No. 131603).

The University of Texas at Austin (the "university") received a request for correspondence between specified university employees and representatives pertaining to the Cactus Café during a specified period of time. You state you are releasing some of the requested information. You have marked some information as non-responsive. You claim the remaining information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note you have marked some information as non-responsive, and we also note some of the remaining submitted information is not responsive to the instant request because it is outside the dates specified in the request. This ruling does not address the public availability of any information that is not responsive to the request, and the university is not required to release that information in response to the request.

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Next, you inform us some of the submitted information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-11557 (2010). In that decision, we ruled some of the requested information was excepted from disclosure under sections 552.107, 552.111, and 552.1235 of the Government Code, but that the university must release the remaining information. As we have no indication that the law, facts, or circumstances on which the prior ruling was based have changed, the university must continue to rely on that ruling as a previous determination and continue to withhold or release any previously ruled upon information in accordance with that prior ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted responsive information was not previously ruled upon, we will consider your arguments against disclosure.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the e-mails you have marked under section 552.107 are communications between university attorneys and their clients, and that these communications were made in furtherance of the rendition of legal services and advice for the university. You have identified most of the parties to these communications. You further state all of these communications were made in confidence and have not been shared or distributed to others. Based on your representations and our review, we agree most of the responsive information you have marked under section 552.107 documents privileged attorney-client communications.² We note, however, one e-mail was communicated with numerous university students. You have not explained how these students are privileged parties with respect to this communication. Therefore, we find this e-mail is not privileged and may not be withheld under section 552.107.

Section 552.111 of the Government Code excepts from public disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

²As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

This office has also concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You have marked the remaining responsive information the university seeks to withhold under section 552.111. You state the information at issue reveals advice, opinions, and recommendations concerning the university's changes, review of, and revisions to plans affecting the Cactus Café. You also indicate one document is a draft that necessarily reflects the advice, opinion, and recommendations of the drafter. You state this draft document is intended for public release in its final form. Based on your representations and our review, we find you have established the deliberative process privilege is applicable to the draft document we have marked. The remaining information at issue consists of e-mails concerning the Cactus Café. We have marked the portions of the e-mails containing advice, opinions, and recommendations related to policymaking. The university may withhold this information under section 552.111 of the Government Code. However, we find some of the remaining responsive information consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, you have failed to demonstrate, and the information does not reflect on its face, how this information is excepted under section 552.111. Additionally, as noted above, one of the e-mails has been communicated with several university students. You have not explained how the university shares a privity of interest or common deliberative process with these students. *See id.* Accordingly, we find none of the remaining responsive information may be withheld under section 552.111 of the Government Code.

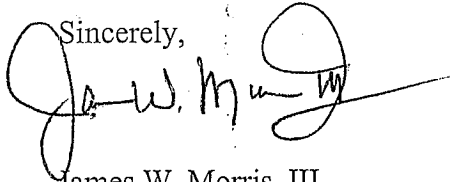
In summary, the university may continue to rely on Open Records Letter No. 2010-11557 as a previous determination and withhold or release any previously ruled upon responsive information in accordance with that prior ruling. With the exception of the e-mail we marked for release, the university may withhold the responsive information you marked under section 552.107 of the Government Code as privileged attorney-client

communications. The university may withhold the responsive information we marked under section 552.111 of the Government Code. The university must release the remaining responsive information.³

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 395263

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the remaining information contains redactions pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>. The university has also redacted personal information of employees subject to section 552.117 of the Government Code under section 552.024 of the Government Code. See Gov't Code § 552.024(c)(2) (if employee or official or former employee or official chooses not to allow public access to his or her personal information, governmental body may redact information without necessity of requesting decision from this office).